STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED March 23, 2001
v	No. 219504 Ingham Circuit Court
JASON DEMYERS, Defendant-Appellant.	LC No. 98-073971-FH

Before: Wilder, P.J., and Smolenski and Whitbeck, JJ.

WHITBECK, J. *(concurring in part and dissenting in part).*

I concur in the majority's cogent analysis of the issues presented in this appeal. I add that, with respect to the jury instruction issue, the trial court in this case specifically referred to the jury's obligation to determine that defendant Jason DeMyers "intended the commission of the crime alleged, that is the delivery of less than 50 grams of cocaine, or must have known that the other person intended its commission at the time of giving the assistance." This complied with the law and, in fact, was a more comprehensive instruction than the one issued to the jury in *People v Mass*,[1] which was deemed sufficient on appeal. Had the record not provided any further cause for concern for me, I would also affirm. I dissent in part and write separately to explain why I believe reversal is nevertheless necessary in this case.

Due process requires that, in every case, the prosecutor must prove the essential elements of a crime beyond a reasonable doubt before a jury can convict the defendant.[2] The essential elements of most crimes fit in one of two categories: elements defining the criminal act (actus reus) and elements outlining intents that are illegal when the actor commits the criminal act (mens rea).[3] Prosecution on an aiding and abetting theory presents an additional theoretical layer

[1] *People v Mass*, 238 Mich App 333; 605 NW2d 322 (2000), lv gtd 462 Mich 877 (2000).

[2] *In re Winship*, 397 US 358, 364; 90 S Ct 1068; 25 L Ed 2d 368 (1970).

[3] See Black's Law Dictionary (1990) (An actus reus is "[t]he 'guilty act.' A wrongful deed which renders the actor criminally liable if combined with mens rea. The *actus reus* is the physical aspect of a crime, whereas the *mens rea* (guilty mind) involves the intent factor."); see also *People v Lardie*, 452 Mich 231, 240-241; 551 NW2d 656 (1996) (discussing the types of intent and distinguishing strict liability crimes for which there need not be proof of intent); *People v Benevides*, 204 Mich App 188, 191; 514 NW2d 208 (1994) (discussing mens rea).

to comprehend because the defendant charged as an aider and abettor did not necessarily commit the illegal act at the center of the case, but rather furthered another actor's efforts to commit that act. Thus, to convict a defendant on an aiding and abetting theory, the prosecutor must prove beyond a reasonable doubt that

> (1) a crime was committed either by the defendant or another, (2) the defendant performed acts or gave encouragement that aided or assisted in the commission of the crime, and (3) the defendant intended the commission of the crime or had knowledge that the principal intended its commission at the time he gave the aid or encouragement.[4]

This second element refers to the specific act the aider must commit, the actus reus, in order to be convicted, while the third element refers to the aider's mens rea.

I wholly agree with the majority that, in most cases, the jury is the proper entity to determine whether there was evidence of intent, which depends significantly on questions of credibility and which could be inferred from any manner of actions in a particular case,[5] including a defendant's spoken words.[6] In this case, however, as I reviewed the trial court record, I realized that there was no evidence that DeMyers committed an act that could subject him to criminal prosecution.[7] The prosecutor's theory of this case was that DeMyers said something to the drug dealer to aid, abet, or otherwise encourage her to sell the drugs to the undercover police officer. The prosecutor, however, could not specify what that act of aiding, abetting, or encouragement was because no one, save DeMyers and the drug dealer, Michelle Richardson, heard the conversation. Whatever legitimate inferences the jury could have drawn from the evidence presented, it could not have concluded beyond a reasonable doubt that the words DeMyers spoke to Richardson constituted aiding and abetting because there was no evidence that he said anything to the effect of "sell that man drugs." DeMyers' testimony explicitly contradicted an inference of aiding, abetting, or encouraging because he said that he tried to convince Richardson *not* to sell drugs. Even if the jury disbelieved every word he spoke

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[4] *People v Buck*, 197 Mich App 404, ; 496 NW2d 321 (1992), modified on other grounds sub nom *People v Holcomb*, 444 Mich 853; 508 NW2d 502 (1993).

[5] *People v Leach*, 114 Mich App 732, 735; 319 NW2d 652 (1982).

[6] *People v Mack*, 112 Mich App 605, 611; 317 NW2d 190 (1981).

[7] While DeMyers did not raise this issue in his brief on appeal and his appellate attorney declined to raise it at oral arguments, I believe that manifest injustice would occur if the Court ignored this issue and that the plain error doctrine permits review in this situation. See, generally, *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999). From my perspective, in the face of manifest injustice, only an unjust court would ignore an outcome determinative error that reached the very core of the factfinding function of a jury trial. I do not intend any disrespect to my colleagues and their different interpretation of the evidence on the record. As my dissent indicates below, the record permits any number of strong assumptions and suspicions about what occurred in this case. Rather, my comment is intended to explain why, in light of the ordinarily restrained review granted on appeal to questions not properly raised or presented, I would still reach this question.

while testifying, as was the jury's province, there is still a gaping hole in the evidence describing *what* DeMyers did to aid, abet, or encourage Richardson. In my view, this failure of proof was fatal to the prosecution.

The police and prosecutor may actually be correct. DeMyers might have encouraged Richardson to sell drugs to the undercover police officer. If a "traditional" or "apparent" drug deal exists, the circumstances of this case tend to fit well within such an archetype given DeMyers' evident familiarity with street language for drug transactions, the time of night at which the transaction occurred, his proximity to a house with known drug activity, and the fact that Richardson sold drugs to the undercover officer immediately after DeMyers spoke with her. However, the sum total of the evidence on the record is that DeMyers spoke with a woman who subsequently sold drugs. Although unwise for any number of reasons, speaking with a drug dealer is not a crime in and of itself. Without evidence that the words DeMyers spoke to Richardson somehow supported her drug sale, or that he made some sort of gesture or movement that can be interpreted as encouragement, or even that he was found possessing marked currency used in the police transaction with her, this conversation alone cannot serve as the actus reus for the aiding and abetting charge. Conviction based on this evidence is tantamount to conviction for mere presence at the scene of a crime, which is impermissible.[8]

The confounding factor in this case is that the alleged actus reus of DeMyers' crime, the manner in which he aided, abetted, encouraged, or otherwise supported the drug transaction, was his speech. The words a defendant speaks are frequently used to prove his intent in committing a crime.[9] If those words had been audible to the undercover police officer who observed DeMyers speak with Richardson, DeMyers' words may have revealed both the encouragement he allegedly gave her and his intent. However, without evidence of what those words were to prove that a criminal act occurred, the jury could not possibly determine whether DeMyers had a guilty intent; there was no evidence of a wrongful act for which he had to have had *any* sort of intent, whether good or bad. Accordingly, I cannot support affirming in this case by relying on the jury's clearly superior ability to make credibility judgments, including judgments concerning intent.

/s/ William C. Whitbeck

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[8] See *People v Slate*, 117 Mich App 501, 503; 324 NW2d 68 (1982).

[9] *Mack*, *supra*.